statutes, yet in view of the reasoning adopted in its support, it seems that the criticism was well directed. Since the purpose of the statute involved, as interpreted by the New York Courts, was indemnity,[14] the case clearly falls without the scope of the doctrine of the *Coffey Case* which has been limited strictly to actions whose purpose is clearly that of punishment.

DETERMINATION OF PERIOD TO WHICH WORDS OF SURVIVORSHIP REFER.—Whenever words of survivorship are contained in a devise creating a tenancy in common, the supposed incompatibility between such a tenancy and an indefinite survivorship early caused the courts to demand that some period be fixed to which these words can be limited. If the gift be immediate it is presumable that the testator intended to provide against the death of the objects of his bounty during his own lifetime, and survivorship, consequently, is properly applicable to the date of his decease.[1] Where, however, an intermediate estate is created there is obviously a second period to which these words can be referred, and in dealing with such gifts, many courts, following the rule enunciated above, and influenced moreover by the conception that inconsistency cannot otherwise be avoided, have held that even in these cases the survivors must be ascertained at the death of the testator.[2] The arguments offered in support of this view concern themselves more with the established tendencies of the courts in the construction of wills than with an attempt to discover the true import of the expressions used. Thus, it is said that the desirability of precluding the possibility of a total intestacy, which might result from the death of all the remaindermen during the life of the intermediate tenant, demands such a construction.[3] On the other hand, the unusual favor with which the law looks upon a vested as distinguished from a contingent interest is supposed to afford an even stronger justification for this view;[4] though surely the force of this latter argument is somewhat impaired by the present inability of a particular tenant to destroy the contingent remainder by means of fine or recovery. As a result of such considerations, the doctrine that survivorship is referable to the death of the testator seems to have been applied, especially in the earlier decisions, almost with the force of a rule of law. In spite of this, the courts were not loath to recognize the potency of special circumstances indicating a contrary intent, such as the non-existence of the designated subject matter of the gift until the time of distribution,[5] or the presence of other bequests specifically referred to the same period.[6] In the decision

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[14]See People *v.* Briggs (1889) 114 N. Y. 56; People *v.* Rohrs (N. Y. 1888) 49 Hun 150; State *v.* Corron *supra.*

[1]But see Morse *v.* Mason (Mass. 1865) 11 Allen 36.

[2]Rose *v.* Hill (1766) 3 Burr. 1881.

[3]Ross *v.* Drake (1860) 37 Pa. St. 373.

[4]Maberly *v.* Strode (1797) 3 Ves. 450; Doe *v.* Prigg (1828) 8 B. & C. 231.

[5]Brograve *v.* Winder (1795) 2 Ves. 634.

[6]Daniell *v.* Daniell (1801) 6 Ves. 297; *cf.* Newton *v.* Ayscough 19 Ves. 534.

of *Cripps* v. *Wolcott*,[7] however, the court squarely laid down the rule that survivorship should be referred to the date of distribution. Although it is to be observed that the gift in that case did not involve real estate and was solely in the direction to divide, yet attempts to restrict this doctrine to gifts of personalty,[8] or to a class, as distinguished from designated individuals,[9] or to cases where there is no prior distinct gift,[10] have not met with approval. Such, moreover, is now the law in England and in a majority of American jurisdictions,[11] this presumption yielding only to a context which clearly evinces a contrary intention.[12] In the wider application of the doctrine it follows that when a life tenant dies in the testator's lifetime, the death of the latter fixes the period of distribution;[13] and on a gift after several life estates those only are entitled who survive the last life tenant.[14] Although this rule may at times lead to a result which was not within the contemplation of the testator, yet it seems best to effectuate the intention disclosed by the words used, for the better presumption would seem to be that he desired to provide against contingencies which might happen during the intermediate estate rather than those occurring during his own lifetime.

If, however, words of survivorship occur in connection with a gift after a life interest to be paid at majority, a new period has been introduced to which they may refer, and the ascertainment of this time depends upon the purpose for which the direction as to payment was introduced. If the testamentary intent was merely to postpone the enjoyment of the bequest until a time when the remaindermen would presumptively be in a position to properly care for it, the rule enunciated above would still be applicable,[15] but if the words of survivorship were so connected with the direction for payment as to evince an intention that only those should take who survived the given age, these words would properly be referable to this last event.[16]

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[7]4 Madd. 11 (1819). The early English rule is, however, still adhered to in several States. See Clanton *v.* Estes (1886) 77 Ga. 352; Hoover *v.* Hoover (1888) 116 Ind. 498; Rood *v.* Hovey (1883) 50 Mich. 395; Ross *v.* Drake *supra;* Martin *v.* Kirby (Va. 1854) 11 Gratt. 67.

[8]Doe *v.* Prigg *supra.* It was settled in *In re* Gregson's Trust (1864) 2 De G. J. & S. 428 that the rule is equally applicable to realty.

[9]Moore *v.* Lyons (N. Y. 1840) 25 Wend. 119.

[10]Hearn *v.* Baker (1856) 2 Kay & J. 383; *cf.* Nicoll *v.* Scott (1881) 99 Ill. 529.

[11]See *In re* Winter (1896) 114 Cal. 186; Blatchford *v.* Newbarry (1880) 99 Ill. 11, *cf.* Arnold *v.* Alden (1898) 173 Ill. 229, not citing previous Illinois cases; Wren *v.* Hynes (Ky. 1859) 2 Met. 129; Denny *v.* Kettell (1883) 135 Mass. 138; Hill *v.* Rockingham Bank (1864) 45 N. H. 270; *cf.* Teed *v.* Morton (1875) 60 N. Y. 506 and Matter of Mahan (N. Y. 1884) 32 Hun. 73, aff'd. 98 N. Y. 372; Biddle *v.* Hoyt (N. C. 1854) 1 Jones Eq. 159; Slack *v.* Bird (1872) 23 N. J. Eq. 238; Sinton *v.* Boyd (1869) 19 Ohio St. 30; Selman *v.* Robertson (1895) 46 S. C. 262, 273; Beasley *v.* Jenkins (Tenn. 1858) 2 Head 191. See also *In re* Soules (1898) 30 Ont. 140.

[12]*In re* Hopkins Trust (1865) 2 Hem. & M. 411.

[13]Spurrell *v.* Spurrell (1853) 11 Hare. 154.

[14]*In re* Fox's Wills (1865) 35 Beav. 163.

[15]Turing *v.* Turing (1846) 15 Sim. 139; Dorville *v.* Wolff (1846) 15 Sim. 510. *Cf.* Tribe *v.* Newland (1852) 5 De G. & Sm. 236.

[16]Knight *v.* Knight (1858) 25 Beav. 111; Theobald, Wills (7th ed.) 682.

This distinction is emphasized by the fact that a gift over, to take effect in case all the ultimate devisees die before the termination of the intermediate estate, naturally raises a presumption that survivorship should be ascertained with reference to this latter event,[17] whereas such a gift, similarly contingent upon death before the attainment of the given age, operates to preclude such an inference.[18]

In a recent case, *Hawke* v. *Lodge* (Del. 1910) 77 Atl. 1090, the court in construing a gift of money in trust for A for life, and at her death the principal "to be equally divided among her three children or the survivor or survivors of them at their majority," gave this distinction its due weight and held that since the direction as to payment was independent of the gift to survivors, the period referred to was the death of the life tenant, and that a child attaining twenty-one and dying before A took nothing. It should be observed, however, that if the testator, proceeding on the assumption that the estate of the life tenant shall have terminated before any provision is to become effective as to the remaindermen, intended that their interests should not be defeated by death before the time to which, for some reason irrespective of their personal qualifications, the distribution is postponed, this intention is frustrated by such a construction.[19]

[17]Fisher *v.* Moore (1855) 1 Jur. [N. S.] 1011.

[18]Alty *v.* Moss (1876) 34 L. T. [N. S.] 312.

[19]2 Jarman, Wills (5th ed.) 685.